STATE OF MICHIGAN

COURT OF APPEALS

MANCIE L. GIPSON,

Plaintiff-Appellee,

v

BELVEDERE CONSTRUCTION, INC., a/k/a VERONA ACCEPTANCE, INC.,

Defendant,

and

MAURICE J. LEZELL,

Defendant-Appellant.

UNPUBLISHED
July 7, 2011

No. 296765
Wayne Circuit Court
LC No. 07-718351-CH

MANCIE L. GIPSON,

Plaintiff-Appellee,

v

BELVEDERE CONSTRUCTION, INC., a/k/a VERONA ACCEPTANCE, INC.,

Defendant-Appellant,

and

MAURICE J. LEZELL,

Defendant.

No. 296769
Wayne Circuit Court
LC No. 07-718351-CH

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

In Docket No. 296765, defendant, Maurice J. Lezell (Lezell), appeals as of right from a judgment for plaintiff. In Docket No. 296769, defendant Belvedere Construction, Inc. (Belvedere), a/k/a Verona Acceptance, Inc., appeals as of right from the same judgment. For the reasons set forth in this opinion, we affirm the judgments.

This case arises from a mortgage given to plaintiff by defendant Belvedere on July 22, 1991 for her home in Detroit. The mortgage was given to secure indebtedness on the home created by an installment home improvement contract. Although the total cost of the home repair project was $5,900, the amount of the mortgage was $8,260. Defendant Lezell was the president and treasurer of Belvedere.

Following execution of the mortgage, the mortgage was sold and bought by various other entities. Significant for purposes of this case is that plaintiff paid off the mortgage in a timely fashion. However, despite having paid off the mortgage in April of 1996, ten years later, Belvedere began foreclosure proceedings against the property in 2006. The property went to auction with a deputy sheriff acting as auctioneer, and Belvedere was given a sheriff's deed conveying the property to them. Before the redemption period expired, plaintiff instituted suit against defendants.[1] Prior to trial, defendants admitted that the foreclosure proceedings were a "mistake" and that plaintiff had paid off her mortgage in 1996.

Following motions for summary disposition, the case proceeded to a bench trial. On the third day of trial, the trial court commented that a count for "slander of title is conspicuously absent." Plaintiff's counsel argued that he had been arguing a slander of title case, and requested that the trial court allow plaintiff to amend their complaint to allege a slander of title claim. The trial court granted leave to amend on the basis that the amendment was to allow the claims to conform to the evidence. The trial court further reasoned that the representation element was common to both fraud and slander of title, and that the proof would not be any different, thus no prejudice would inure to defendants. Plaintiff never amended her complaint.

Following the conclusion of the bench trial, the trial court made findings of fact. The trial court found clear and convincing evidence of fraud by defendants in foreclosing. Regarding slander of title, the trial court found that "[d]efendants could not have honestly believed or reasonably believed they had a legitimate claim to the property." Special damages took the form of attorney fees incurred by plaintiff in the amount of $60,000, which were necessary, according to the trial court, for plaintiff to protect her home. The trial court also found against defendant Lezell stating that at the time of foreclosure, Lezell had sold Belvedere but remained active, so there was no corporate veil for the court to pierce. Despite having sold the company, the trial court found that Lezell continued to use the sold corporate person as his alter ego.

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[1] Plaintiff filed a complaint containing five counts: (1) quiet title; (2) refusal to discharge a mortgage (in violation of MCL 565.44); (3) fraud; (4) exemplary damages; and (5) declaratory relief.

Following the trial court's rulings, plaintiff filed a motion for damages including costs and attorney fees. The trial court granted her motion and awarded $96,000 in attorney fees and costs of $2,640. This appeal ensued.

On appeal, defendants first argue that the trial court clearly erred in finding that defendants committed fraud upon plaintiff when, in 2006, they foreclosed on a mortgage given by plaintiff in 1991 to Belvedere, which had been assigned by Belvedere in 1991 to another entity, and which had been paid off by plaintiff in 1996.

Following a bench trial, this Court reviews the trial court's conclusions of law de novo, and its findings of fact for clear error. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *AFSCME Int'l Union v Bank One, NA*, 267 Mich App 281, 283; 705 NW2d 355 (2005).

This issue is moot. The trial court did not award any damages for fraud. Rather, all of the damages awarded were attorney fees, as special damages for the slander of title that the trial court found had been committed by defendants. We are not obliged to decide moot questions. *Mettler Walloon, LLC*, 281 Mich App at 221.

Next, defendants argue that the trial court erred in suggesting during trial that plaintiff amend her complaint to add a slander of title claim. A judge should avoid impropriety and the appearance of impropriety, and should perform the duties of the office impartially. Code of Judicial Conduct, Canon 3. Here, however, plaintiff's trial counsel represented to the trial court, as an officer of the court, that a slander of title claim had been discussed prior to trial.

MCR 2.118(C) governs the issue of the grant of plaintiff's motion to amend her complaint. MCR 2.118(C)(1) permits amendments of pleadings to conform to the evidence, even after a judgment:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment. [MCR 2.118(C)(1).]

Accordingly, the issue is whether the issue of slander of title was tried by the implied consent of the parties. Count IV of the complaint expressly pleaded that defendants' misrepresentations were made intentionally and maliciously. Malice was the only element of the slander of title claim (other than the type of damages available) that was not already a part of the fraud claim. *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998) (the elements of common-law slander of title are a false statement regarding the plaintiff's title, malice, and special damages). Additionally, the trial court offered to give defense counsel additional time to "get it together." See MCR 2.118(C)(2) (where a party objects at trial to evidence on the ground that the evidence "is not within the issues raised by the pleadings," the trial court "may grant an adjournment to enable the objecting party to meet the evidence"). Defense trial counsel declined.

Defendants cite *City of Bronson v American States Ins Co*, 215 Mich App 612, 619; 546 NW2d 702 (1996). In *City of Bronson*, the plaintiff specifically refused to consent to the inclusion in the case of claims concerning whether the defendant had a duty to defend the plaintiff in an underlying EPA proceeding concerning contamination of a landfill. *Id*. Given that objection, the appellate panel concluded, under MCL 2.118(C), that the trial court's action, in "effectively sua sponte amend[ing] plaintiff's complaint to add an additional claim," was erroneous, because the parties did not consent. *Id*. However, we find *City of Bronson* distinguishable from this case. There, the plaintiff specifically objected to the amendment. *City of Bronson*, 215 Mich App at 619. Here, plaintiff pleaded malice by defendants in their foreclosing in 2006, on the mortgage that Belvedere had assigned to another entity in 1991, and that had been paid off by plaintiff in 1996.

The record reveals that plaintiff pled that defendants' misrepresentations were made intentionally and maliciously in Count IV of her original complaint. Plaintiff's counsel informed the trial court that slander of title had been discussed in advance of trial and that plaintiff had been arguing a slander of title claim from the beginning. After allowing the amendment, the trial court offered to give defense counsel additional time to "get it together," which defense counsel declined. Accordingly, the slander of title claim was tried by the implied consent of the parties.

Further, we find the fact that plaintiff never amended her complaint, following the circuit court's grant of permission to do so, does not mandate reversal. An amendment to a pleading, to conform to the evidence, can occur even after a judgment has been entered. See, MCR 2.118(C)(1).

Defendants next argue that the trial court clearly erred in concluding that defendants had committed slander of title in foreclosing in 2006, on the mortgage that Belvedere had assigned away in 1991, and that plaintiff had paid off in 1996.

Following a bench trial, findings of fact are reviewed on appeal for clear error, and conclusions of law are reviewed de novo. *Mettler Walloon, LLC*, 281 Mich App at 222.

The elements of common-law slander of title are (1) the defendant published a false representation disparaging the plaintiff's right in property; (2) malice in making the misrepresentation; and (3) special damages caused by the misrepresentation. *B & B Investment Group*, 229 Mich App at 8. Defendants published a false representation disparaging plaintiff's right in her home. Nonjudicial foreclosure requires a newspaper notice, which is a notice to all the world that the foreclosure is taking place. Defendants' nonjudicial foreclosure was unmistakably a representation of the following facts: (1) Belvedere held the mortgage; (2) plaintiff had defaulted; and (3) the mortgage had not been paid off. A foreclosure is a representation of these three facts because a foreclosure cannot occur if the foreclosing party does not hold the mortgage, or the mortgagor has not defaulted, or the mortgagor has paid off the mortgage.

Defendants admitted that these representations were false. Belvedere assigned the mortgage in 1991, plaintiff never defaulted, and plaintiff paid off the mortgage in 1996. However, they claim that these representations were a simple "mistake." Thus, the issue left to

decide this claim was malice. On the issue of malice, the trial court drew an adverse inference from defendant Lezell's failure to testify. M Civ JI 6.01(a) authorizes this.

> The [defendants] in this case [have] not offered [the testimony of Lezell]. As this evidence was under the control of the [defendants,] and could have been produced by [them,] and no reasonable excuse for the [defendants'] failure to produce the evidence was given, [the trier of fact, here the trial court judge] may infer that the evidence would have been adverse to the [defendants]. [M Civ JI 6.01(a).]

Defendants argue that the adverse inference was not required, and that it was contradicted by the actual proofs. This argument lacks merit. Defendants do not cite any law indicating that, in a bench trial, the judge cannot draw an adverse inference from a party's failure to testify. Given the lack of authority from defendants to suggest that such an inference cannot be drawn in a bench trial, defendants have not shown an abuse of the trial court's discretion.

Accordingly, the circuit court's adverse inference about what Lezell would have said, had he testified, supports the trial court's finding that defendants acted with malice. Since Belvedere is not a natural person, it could only act (or have intent) through its officers and agents. See *Mossman v Millenbach Motor Sales*, 284 Mich 562, 568; 280 NW2d 50 (1938). Belvedere's agents and officers included Lezell. Hence, the trial court's adverse inference applied equally to Lezell and to Belvedere.

Malice, like fraud, can be proven by circumstantial evidence. Compare *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 458; 559 NW2d 379 (1996) (circumstantial evidence of fraud can be sufficiently clear and convincing evidence). Besides the adverse inference, there is other circumstantial evidence of malice. Daisy Day (plaintiff's sister, who was acting for plaintiff) contacted defendants and told them that the mortgage had been paid off. Yet defendants refused to cease foreclosure. Plaintiff hired an attorney, who wrote defendants, indicating that the mortgage had been paid off.

On September 8, 2006, plaintiff contacted Belvedere, and indicated that she had paid the mortgage in full. Later, on January 17, 2007, counsel for plaintiff sent a letter to counsel for defendants, again indicating that the mortgage was paid off. Defendants still refused to cease their efforts to collect a paid-off debt and to foreclose a mortgage they had not held for several years. The evidence that defendants were repeatedly informed that the mortgage was paid off, yet continued their collection efforts, contributed to the showing of malice. The trial court was the trier of fact, and that conclusion is not clearly erroneous, but reasonable in light of both oral and documentary evidence.

In addition, there was evidence that Belvedere's ledger card for plaintiff's account might have been altered. While somewhat speculative, this testimony and its credibility were for the trial court to resolve. E.g., *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). Reviewing all of the factors presented to the trial court on this issue, we hold that the trial court was entitled to draw the adverse inference that defendants acted with malice. M Civ JI 6.01(a).

Lastly, defendants argue that the trial court erred in finding Lezell personally liable for the torts committed against plaintiff through the attempted seizure of her home.

A corporation is a person in its own right, entirely separate and apart from its shareholders, even if there is only one shareholder. *Foodland Distrib*, 220 Mich App at 456. Normally, shareholders are not personally liable for the acts or debts of the corporation. MCL 450.1317(4). But this is not always true. MCL 450.1317(4) provides: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation[,] *except that he or she may become personally liable by reason of his or her own acts or conduct*." (Emphasis added.) We conclude that Lezell was acting in his personal capacity when he foreclosed on plaintiff's paid-off mortgage. Our decision in *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 287-288; 369 NW2d 487 (1985), leads us to this conclusion. A corporate secretary signed a promissory note that said "we promise to pay" the amount. The corporation was not validly incorporated at the time the note was signed. The panel held that the evidence of the foregoing sufficed to support a finding that the secretary signed the note in her personal capacity, and could be held personally liable. *Id*. at 289-290.

The evidence in the present case is analogous to *Kroll*. Peter DiVito, Jr., who came to work for Belvedere in 1997, testified that from February 1, 1999, Belvedere was not taking on new construction jobs. Rather, the new work was done under the auspices of Belvedere LLC. DiVito testified that one of the ways he was compensating Lezell for his buyout of Lezell's interests in Belvedere, was that Belvedere LLC was still "servicing his [Lezell's] paper." Thus, DiVito bought Belvedere and the Belvedere name, and Belvedere was dissolved in 2001, but *Lezell retained the right to receive payments* on "his" (Lezell's) paper. With Belvedere having been dissolved in 2001, Lezell was acting on his own behalf in these collection efforts. Given this testimony by DiVito, the trial court's conclusion that Lezell was acting in his personal capacity is not clearly erroneous. See *Kroll*, 142 Mich App at 289-290. Additionally, because Belvedere had dissolved in 2001, thereafter, there was no corporate veil to shield Lezell from personal liability.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad